

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7083

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

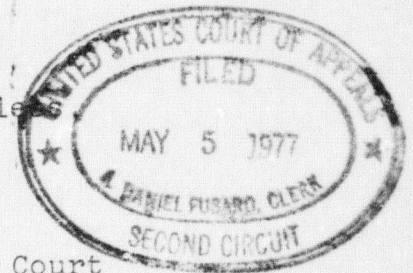
EUGENE E. NERVINA,

Plaintiff-Appellant,

-against-

LIEBERT CORPORATION, JOHN AMBROSE and
JAMES W. GOOD,

Defendants-Appellees



On Appeal from the United States District Court
for the Southern District of New York.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES

SEWARD & KISSEL
Attorneys for Defendants-
Appellees
63 Wall Street
New York, New York 10005
(212) 248-2800

ANTHONY R. MANSFIELD
JON PAUL ROBBINS
Of Counsel

12.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	11
PRELIMINARY STATEMENT.	1
THE ISSUES PRESENTED	2
COUNTER-STATEMENT OF THE CASE.	3
The Facts	3
The Proceedings	4
ARGUMENT	5
I. THE AUGUST 10, 1976 DOCUMENT WAS A GENERAL RELEASE AND BARS THIS ACTION.	5
A. The August 10, 1976 Document Was a General Release	6
B. The Cases Nervina Cites Are Inapplicable.	9
C. The August 10, 1976 Document Bars The Action Against Appellees Good and Ambrose	15
II. THE RECORD PROVES NERVINA DID NOT SIGN THE AUGUST 10, 1976 DOCUMENT UNDER DURESS	15
III. THE AUGUST 10, 1976 DOCUMENT WAS AN ACCORD AND SATISFACTION AND BARS THIS ACTION	18
IV. THIS COURT LACKS PERSONAL JURISDICTION OVER APPELLEE GOOD	20
V. THE FIRST COUNT SHOULD BE DISMISSED AGAINST APPELLEE GOOD BECAUSE IT DOES NOT ALLEGE THAT HE AND NERVINA ENTERED INTO A CONTRACT.	22
CONCLUSION	23

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Barrett v. Third Avenue R. R. Co.</u> , 45 N.Y. 628 (1871)	20
<u>Bober v. McDonnell & Co.</u> , 36 App. Div. 2d 940, 321 N.Y.S. 2d 474 (1st Dep't 1971)	11
<u>Chunky Corp. v. Blumenthal Bros. Chocolate Corp.</u> , 299 F. Supp. 110 (S.D.N.Y. 1969)	22
<u>Dury v. Dunadee</u> , 52 App. Div. 2d 206, 383 N.Y.S. 2d 748 (4th Dep't 1976).	10
<u>Empire Industries v. Mastic Tile Corp. of America</u> , 15 F.R.D. 385 (S.D.N.Y. 1954)	17
<u>Gavin v. Malherbe</u> , 146 Misc. 51, 261 N.Y.S. 373 (Sup. Ct. Kings Co. 1932), <u>aff'd</u> , 240 App. Div. 779, 266 N.Y.S. 897 (2d Dep't 1933), <u>aff'd</u> , 264 N.Y. 403, 191 N.E. 486 (1934).	15
<u>Graham v. Taller & Cooper, Inc.</u> , 91 F. Supp. 419 (E.D.N.Y. 1950).	14
<u>Hammond Ford, Inc. v. Ford Motor Co.</u> , 204 F. Supp. 772 (S.D.N.Y. 1962).	13-14
<u>In re NTA, Inc.</u> , 11 Misc. 2d 333, 169 N.Y.S. 2d 395 (Sup. Ct. N.Y. Co. 1957), <u>aff'd</u> , 8 App. Div. 2d 799, 188 N.Y.S. 2d 955 (1st Dep't 1959)	8
<u>Knapp Engraving Co., Inc. v. John Post Constr. Corp.</u> , 107 N.Y.S. 2d 328 (Sup. Ct. N.Y. Co. 1951), <u>aff'd</u> , 280 App. Div. 763, 113 N.Y.S. 2d 647 (1st Dep't), <u>motion for leave to appeal or for reargument</u> <u>denied</u> , 280 App. Div. 864, 114 N.Y.S. 2d 256 (1st Dep't 1952).	9
<u>Littell v. Cranford Co.</u> , 203 N.Y.S. 2d 975 (Sup. Ct. Queens Co. 1960)	20
<u>Lucio v. Curran</u> , 2 N.Y. 2d 157, 157 N.Y.S. 2d 948 (1956)	7-8, 11, 14

<u>Magidson v. Bloom</u> , 170 Misc. 832, 11 N.Y.S. 2d 324 (N.Y. City Ct. 1939)	15
<u>Meyers v. Hussey Realty Corp.</u> , 45 N.Y.S. 2d 137 (Sup. Ct. N.Y. Co. 1943)	12
<u>Mittendorf v. Williston & Beane, Inc.</u> , 372 F. Supp. 821 (S.D.N.Y. 1974)	7-8, 17
<u>Path Instruments International Corp. v. Asaki Optical Co.</u> , 312 F. Supp. 805 (S.D.N.Y. 1970)	20-22
<u>Sage v. Hale</u> , 80 Misc. 2d 812, 364 N.Y.S. 2d 781 (Sup. Ct. Saratoga Co. 1975)	11
<u>Schine v. Schine</u> , 250 F. Supp. 822 (S.D.N.Y. 1966) . .	13
<u>Schine v. Schine</u> , 254 F. Supp. 986 (S.D.N.Y. 1966) . .	13
<u>State v. Davies</u> , 24 App. Div. 2d 240, 265 N.Y.S. 2d 358 (3rd Dep't 1965), <u>aff'd</u> , 18 N.Y. 2d 950, 277 N.Y.S. 2d 146 (1966)	21
<u>Topat Equipment Co. v. Porter</u> , 50 App. Div. 2d 1098, 377 N.Y.S. 2d 339 (4th Dep't 1975)	12
<u>Viskovich v. Walsh-Fuller-Slattery</u> , 16 App. Div. 2d 67, 225 N.Y.S. 2d 100 (1st Dep't 1962), <u>aff'd</u> , 13 N.Y. 2d 1100, 246 N.Y.S. 2d 632 (1963) . .	8-9

FEDERAL RULE OF CIVIL PROCEDURE

Rule 12(b)	4
----------------------	---

NEW YORK STATUTE

CPLR 302	21
--------------------	----

SECONDARY SOURCES

<u>McLaughlin, Practice Commentaries</u> 202, 7B McKinney CPLR 302 at 70	21
1 N.Y. Jurisprudence <u>Accord & Satisfaction</u> §§1, 10, 34 (1958)	18
49 N.Y. Jurisprudence <u>Release and Discharge</u> §§28-29 (1966)	6

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 77-7083

EUGENE E. NERVINA,

Plaintiff-Appellant,

-against-

LIEBERT CORPORATION, JOHN AMBROSE and
JAMES W. GOOD,

Defendants-Appellees.

BRIEF ON BEHALF OF DEFENDANTS-
APPELLEES

PRELIMINARY STATEMENT

Plaintiff-appellant Nervina appeals from the Honorable Dudley B. Bonsal's order dated January 10, 1977 (A61).^{*} That order granted defendants-appellees' ("appellees") motion to dismiss the complaint on the ground that the action is barred by a release and an accord and satisfaction

^{*}Numerical references with the prefix "A" refer to the Appendix. Numerical references with the prefix "SA" refer to the Supplemental Appendix.

and, with respect to appellee Good, on the additional grounds that the Court lacks jurisdiction over his person and that the first count in the complaint fails to state a claim against him upon which relief can be granted. Judgment dismissing the complaint was entered on January 12, 1977 (A60).

THE ISSUES PRESENTED

I. In view of the clear and unambiguous language of the August 10, 1976 document in which Nervina stated that he released "any and all claims" he might have had, and in the absence of any evidence that Nervina intended to limit the effect of the document, has Nervina shown the existence of a genuine issue of material fact as to whether the document was a general release which bars this action?

II. In view of the uncontroverted fact that Nervina refused to sign the August 10, 1976 document until he had consulted his attorney, and later signed the document after he did consult his attorney, and in the absence of any evidence that Nervina signed the document under duress, has Nervina shown the existence of a genuine issue of material fact as to whether he executed the document under duress?

III. In view of the uncontroverted fact that Nervina signed the August 10, 1976 document, accepted payment under it and agreed that his relationship with Liebert was

terminated, has Nervina shown the existence of a genuine issue of material fact as to whether the document was an accord and satisfaction?

IV. In light of the uncontroverted fact that appellee Good is a resident of Ohio who was served in that State and who did not take any action in New York on his own behalf in connection with the subject matter of this action, has Nervina met his burden of proof that this Court has jurisdiction over Good's person?

V. Does the first count of the complaint, which alleges that Nervina and appellee Liebert Corporation ("Liebert") entered into a contract and which does not even allege that appellee Good was a party to the purported contract, state a claim against Good for breach of the purported contract?

COUNTER-STATEMENT OF THE CASE

The Facts

This action is nothing more than an attempt by Nervina to reopen a dispute that was settled in August 1976. Nervina has brought this action against Liebert, the Liebert employee who dealt with Nervina, and the person who replaced Nervina at Liebert when Nervina

resigned (A13-14). The complaint ignores that Nervina executed a document that extinguished any claim he might have had against appellees, and which is an absolute bar to this attempt to obtain a double recovery.

Liebert employed Nervina as a salesman in its New York office in July, 1975 (A12-13). In June 1976, Liebert decided to employ a second person in that office, and hired appellee Ambrose. Nervina refused to work with Ambrose and resigned. A dispute then arose between Nervina and Liebert as to Liebert's financial obligations to Nervina. After negotiations, this dispute was settled in August 1976 and Nervina, after consulting with his attorney, signed a document dated August 10, 1976 which provided that in consideration of Liebert making certain payments to Nervina, Nervina agreed that the relationship between the parties was "terminated" and that Liebert had paid the "entire amount" owed him. The document also provided that Nervina released all claims and rights of action which he might have had (A13, A48-49).

The Proceedings

The complaint was served in late 1976. Appellees moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b) on the ground that the action is barred by an accord and satisfaction and by a release, and, with respect to appellee Good, on the additional grounds that this Court lacks jurisdiction

over his person and that the first count in the complaint fails to state a claim against him upon which relief can be granted (All). Nervina's counsel argued that the effect of the August 10, 1976 document was limited to Nervina's claim for bonus payments, despite the fact that the document clearly provided that Nervina released "any and all claims" he might have had. Nervina's counsel also argued that, in any event, the August 10 document was executed under duress. Significantly, nowhere in his affidavit did Nervina himself claim that he intended to limit the effect of the August 10 document or that he signed the document under duress.

Judge Bonsal heard argument on the motion on January 10, 1977. He questioned counsel for both sides closely, and paid particular attention to the issue of duress (SA3-4). Through his questions Judge Bonsal extracted from Nervina's counsel the admission that Nervina had consulted him before executing the August 10 document (SA4). At the conclusion of the argument Judge Bonsal asked Nervina's counsel if he had anything more to say, and when counsel indicated he did not, Judge Bonsal granted the motion (SA5).

Argument

I

THE AUGUST 10, 1976 DOCUMENT WAS A
GENERAL RELEASE AND BARS THIS ACTION

The complaint purports to allege two counts against Liebert. The first count alleges breach of an oral

contract to establish Nervina as Liebert's exclusive independent sales representative in the New York area. The second count against Liebert (the third count in the complaint) alleges tortious fraud and misrepresentation by Liebert in an attempt to obtain Nervina's trade secrets. Even if Nervina's allegations were true (which Liebert denies), the August 10, 1976 document bars this action. When Nervina signed that document and accepted payment thereunder he relinquished any claims he had. He may not now bring this action in attempt to recover a second time for those same claims.

A. The August 10, 1976 document was a general release.

By the express terms of the August 10 document, Nervina released Liebert from all claims, demands, causes and rights of action which he had by reason of any matter whatsoever. Any claims Nervina might have had were extinguished by the release, and this action is barred. 49 N.Y. Jur. Release and Discharge, §§28-29 (1966).

The law in New York is that the effect of a release is not limited to the preliminary discussion that led up to its execution if the parties include in the instrument demands not previously suggested or all subsisting causes of action. Although only certain demands may have been

discussed, the release will be operative according to its terms and will discharge all claims the releasor may have had against the party released. Lucio v. Curran, 2 N.Y. 2d 157, 157 N.Y.S. 2d 948 (1956). A release which is general in its terms will dispose of all demands, obligations, and claims in existence between the parties to the instrument at the time of the execution of the release. Lucio v. Curran, supra; Mittendorf v. Williston & Beane, Inc., 372 F. Supp. 821, 836 (S.D.N.Y. 1974). The "claims" Nervina alleges in the complaint were in existence at the time he executed the August 10 document and they are barred by that release.

Lucio v. Curran, supra, is directly in point. The terms of the release in that case discharged all "causes of action, suits . . . controversies . . . claims and demands whatsoever." Plaintiff in that case argued, as Nervina's counsel does here, that he had not intended to discharge the claim he was suing on, and the release should be limited to the claim he "meant" to discharge. The New York Court of Appeals rejected plaintiff's argument, and held the release barred the action because the

words of general release are clearly operative not only as to all controversies and causes of action between the releasor and releasees which had,

by that time, actually ripened into litigation, but all such issues which might then have been adjudicated as a result of pre-existent controversies . . . and notwithstanding plaintiff's intent to commence a further suit for redress. 2 N.Y. 2d at 161-162, 157 N.Y.S. 2d at 952. [Emphasis in original.]

Similarly, Nervina gave a general release, and its words are "clearly operative" as to all existing claims he might have had against appellees, regardless of whether he later intended to bring a suit based on some of those claims. It is not what the parties intended that controls, but what an unambiguous release expresses. In re NTA, Inc., 11 Misc. 2d 333, 169 N.Y.S. 2d 395 (Sup. Ct. N.Y. Co. 1957), aff'd, 8 App. Div. 2d 799, 188 N.Y.S. 2d 955 (1st Dep't 1959). The "causes of action" Nervina asserts in the complaint arose before he gave the release, and he is bound by the release's discharge of those claims. Lucio v. Curran, supra, 2 N.Y. 2d at 162, 157 N.Y.S. 2d at 952; Mittendorf v. Williston & Beane, Inc., supra, 372 F. Supp. at 836.

This is especially so since Nervina consulted counsel before he executed the release, and counsel presumably explained its meaning to him. Viskovich v. Walsh-Fuller - Slattery, 16 App. Div. 2d 67, 225 N.Y.S. 2d 100 (1st Dep't 1962), aff'd, 13 N.Y. 2d 1100, 246 N.Y.S. 2d 632 (1963). If Nervina and his lawyer wanted to limit the effect of the release,

they should have inserted such a limitation in the document prior to its execution. In re NTA, supra, 11 Misc. 2d at 336, 169 N.Y.S. 2d at 398; Knapp Engraving Co., Inc. v. John Post Constr. Corp., 107 N.Y.S. 2d 328 (Sup. Ct. N.Y. Co. 1951), aff'd, 280 App. Div. 763, 113 N.Y.S. 2d 647 (1st Dep't), motion for leave to appeal or for reargument denied, 280 App. Div. 864, 114 N.Y.S. 2d 256 (1st Dep't 1952). Nervina may not now be heard to argue, after reading the release, consulting counsel, and executing it, that the release should be limited in a manner plainly inconsistent with its terms. Indeed, Nervina himself has not even stated that he intended to give only a limited release. His affidavit in opposition to the motion (A25-27) does not say he meant to limit the August 10 document's effect to his claim for bonuses. It is only Nervina's counsel, in his brief, who argues his client intended to give a limited release. Counsel's contentions are not evidence, and they should be disregarded.

B. The cases Nervina cites are inapplicable.

In an attempt to misdirect the Court, Nervina has relied on cases where releases were asserted against causes of action that were not in existence at the time the releases were executed, and to which the releases could not possibly apply. Any claims Nervina had against appellees arose prior

to his execution of the August 10, 1976 document. The release provision in the August 10 document, by its express terms, was intended to discharge all pre-existing claims, and it should be given the effect which its language demands.

Nervina has also cited cases where the releases contained language limiting their effect to a particular claim, and argues those decisions apply because the August 10 document refers to the bonus dispute between Liebert and Nervina. Nervina ignores the crucial distinction between those cases and the one at bar. The release provision in the August 10 document, the provision in the document relied on by appellees, does not refer or limit its application to a particular claim. Its language is general and all inclusive, and Nervina cannot limit its effect.

Dury v. Dunadee, 52 App. Div. 2d 206, 383 N.Y.S. 2d 748 (4th Dep't 1976), is typical of the cases Nervina relies on. The general language of the release provision was followed by a reference to a particular claim, which was different from that sued upon, and against which the release was asserted. The court held the general language of the release might be limited by the reference to the particular claim which followed it. The court also noted that this was a personal injury case, where special rules of interpretation apply when the damages sought were unknown at the time the release was given. Dury has no

application. The general language is not followed by a provision limiting its application and Nervina's claims, if any, were in existence when he signed the August 10 document.

Nervina also seeks to rely on Sage v. Hale, 80 Misc. 2d 812, 364 N.Y.S. 2d 781 (Sup. Ct. Saratoga Co. 1975), another personal injury case which is not applicable, although the court's discussion is instructive. The court cited Lucio v. Curran, supra, and agreed that the general rule is that the effect of a general release cannot be limited or curtailed. The court distinguished Lucio on the grounds that, in the case before it, the cause of action sought to be barred was not in existence at the time the release was given, and the general language of the release was followed by a provision stating it was for a particular injury. The case at bar is the same as Lucio, and is distinguishable from Sage. Nervina's causes of action arose before he gave the release, and the release provision of the August 10 document does not contain any words of limitation.

Nervina cites Bober v. McDonnell & Co., 36 App. Div. 2d 940, 321 N.Y.S. 2d 474 (1st Dep't 1971), which clearly is not in point. There, an action was settled and a release was given which was "limited to any and all claims alleged" in the settled action. Nervina did not "limit" his release to any

particular claim; to the contrary, he gave a general release of "any and all claims." Nor is Topat Equipment Co. v. Porter, 50 App. Div. 2d 1098, 377 N.Y.S. 2d 339 (4th Dep't 1975), applicable. That case also involved a release provision that was limited to a particular claim. The defendant did not even raise the release as a defense in its answer, and the court held this failure was evidence the defendant knew the release did not apply to the claim asserted.

Nervina relies heavily on Meyers v. Hussey Realty Corp., 45 N.Y.S. 2d 137 (Sup. Ct. N.Y. Co. 1943), which is also distinguishable. Defendant there asserted a release as a bar to an action based on events which did not occur until 21 years after plaintiff executed the release. The court properly found that plaintiff had only released defendant for claims he had at the time of the release, not claims that might arise 21 years later. At the time plaintiff gave the release he had no other claims, and there was no assurance he ever would have any other claims. The release did not state that plaintiff was giving up claims that might arise as a result of future events, and the court correctly refused to interpret it as doing so. But in the instant case any claims Nervina might have had existed when he gave the release, and the release itself states that Nervina discharged "any and all claims" he had.

Nervina cites only one decision in Schine v. Schine, 254 F. Supp. 986 (S.D.N.Y. 1966). But Nervina fails to cite an earlier opinion in the same case, reported at 250 F. Supp. 822 (S.D.N.Y. 1966), which sets forth the facts and makes clear that it is distinguishable from the case at bar. Defendants there argued that the release in question extended not only to claims in existence at the time of the agreement, but to future claims as well. The court held that the release was ambiguous on this point, and that summary judgment could not be granted. The court also noted that summary judgment would have been granted if the release was "without obvious or latent ambiguities." 250 F. Supp. at 825.

Schine is therefore inapplicable. First, appellees do not contend that the August 10 document barred claims that were not in existence at its delivery; they contend only that it bars all claims, including the ones alleged in the complaint, that might have existed at that time. Second, it cannot be argued that the August 10 document is ambiguous. It provides that in consideration of certain payments, Nervina released "any and all claims" he might have had. The document is "without obvious or latent ambiguities" and the motion to dismiss was properly granted. Schine, supra, 250 F. Supp. at 825.

Hammond Ford, Inc. v. Ford Motor Co., 204 F. Supp. 772 (S.D.N.Y. 1962) is equally inapplicable. There was no

general release in that case. Defendants relied on a document that contained no reference to any settlement, compromise or release. The court denied summary judgment and noted that it was difficult to understand why there should not have been "a very simple reference that on payment of the amount agreed upon herein [plaintiff] should execute a general release." 204 F. Supp. at 775. In the instant case there was just such "a very simple reference." Judge Bonsal correctly held that it bars this action and dismissed the complaint. His decision should be affirmed.

The opinion in Graham v. Taller & Cooper, Inc., 91 F. Supp. 419 (E.D.N.Y. 1950) does not correctly set forth the law of New York. The Graham court stated that the law in New York is that a general release does not bar a claim unless it can be shown that the release was intended to discharge that particular claim. This predates and is contrary to the rule set forth in the later New York Court of Appeals decision of Lucio v. Curran, supra, pp. 7-8, which is controlling here. A general release is operative to all issues "which might then have been adjudicated as a result of pre-existent controversies . . . and notwithstanding plaintiff's intent to commence a further suit for redress." Lucio v. Curran, supra, 2 N.Y. 2d at 162, 157 N.Y.S. 2d at 952. Nervina gave a general release,

and even if he intended to limit its effect (and there is no evidence that he did) he is bound by its clear and unambiguous language. Nervina gave up any claims he might have had. He may not now avoid the clear impact of the document he executed, and under which he accepted payment.

- C. The August 10, 1976 document bars the action against appellees Good and Ambrose.

The release provision of the August 10 document also bars the maintenance of this action against Good and Ambrose. The release of either party to a master-servant or principal and agent relationship operates to release the other. Gavin v. Malherbe, 146 Misc. 51, 261 N.Y.S. 373 (Sup. Ct. Kings Co. 1932), aff'd, 240 App. Div. 779, 266 N.Y.S. 897 (2d Dep't 1933), aff'd, 264 N.Y. 403, 191 N.E. 486 (1934); Magidson v. Bloom, 170 Misc. 832, 11 N.Y.S. 2d 324 (N.Y. City Ct. 1939).

II

THE RECORD PROVES NERVINA DID NOT SIGN THE AUGUST 10, 1976 DOCUMENT UNDER DURESS

In an effort to avoid the clear language of the August 10, 1976 accord and satisfaction and release, and unsupported by any evidence, Nervina's counsel has attempted to insert a nonexistent element of "duress" into this case. After questioning counsel at length, Judge Bonsal correctly refused to countenance such an attempt.

Liebert and Nervina had a dispute over the amount Liebert owed Nervina. In a desire to compromise the dispute, and to avoid litigation, Liebert made the business decision to pay Nervina more than Liebert believed it owed. In consideration for this payment, Liebert required Nervina to execute a general release. Nervina's counsel cannot now make the bald assertion that Nervina was coerced into executing the release, an assertion which is not even supported in Nervina's affidavit in opposition to the motion.

Nervina's affidavit does not allege he was coerced into signing the August 10 document. The affidavit alleges only that Liebert would not settle with him unless he executed it (A27). Of course, this is true. Liebert naturally would not make a substantial payment, which it did not believe it owed, unless it had a reasonable assurance that Nervina could not bring an action against it. Since there is no evidence of duress (counsel's contention in a brief is no substitute for an affidavit), the Court should affirm Judge Bonsal's summary dismissal. This is especially so in view of the fact that Nervina consulted counsel before he signed the August 10 document. Indeed, he had refused to execute the document until he could talk to his lawyer. No one told Nervina he had to sign - he decided to do so of his own free will. The effect of the release cannot now be vitiated by an unsubstantiated allegation of duress.

A contention similar to Nervina's was made and rejected in Mittendorf v. Williston & Beane, Inc., 372 F. Supp. 821 (S.D.N.Y. 1974). Plaintiff claimed that a release should be set aside for fraud. The court held that when all parties were "ably represented by counsel," and when the negotiations were "at arm's length," "no credible proof whatsoever has been offered that indicated fraud in the procurement or in the execution of the release." 372 F. Supp. at 835. Similarly, in the instant case all parties were represented by counsel and the negotiations were at arm's length. There is no evidence of duress, and Judge Bonsal's decision upholding the release should be affirmed.

Empire Industries v. Mastic Tile Corp. of America, 15 F.R.D. 385 (S.D.N.Y. 1954), cited by Nervina in support of his allegation of duress, is not in point. The record in that case showed that plaintiff was in a desperate situation, that defendant was well aware of that fact, and that defendant took advantage of its dominant position to coerce plaintiff by oppressive business measures to execute a general release. The record in the instant case is devoid of any similar evidence, or even of any similar allegations. Nervina's affidavit does not say that he was in a desperate situation, or that Liebert was aware of it or that Liebert coerced Nervina into signing the release. To the contrary, the record is clear that Liebert and Nervina agreed on a settlement figure, that Nervina wished to

consult his attorney before executing a general release, that Liebert agreed that Nervina had the right to consult his attorney, that Nervina did in fact consult his attorney and that he signed the release only after doing so.

The record is also clear that Judge Bonsal was concerned about the claim of duress (SA4-5). He questioned counsel for appellees and for Nervina closely, and it was only after counsel for Nervina admitted he had advised Nervina with respect to the release that Judge Bonsal granted the motion to dismiss. This Court should affirm his decision.

III

THE AUGUST 10, 1976 DOCUMENT WAS AN ACCORD AND SATISFACTION AND BARS THIS ACTION

Nervina signed the August 10, 1976 document, accepted payment under it, and thereby agreed that Liebert had paid him the "entire amount" he claimed Liebert owed him. The document, therefore, is an accord and satisfaction, and bars this action. 1 N.Y. Jur. Accord and Satisfaction §§1, 10 (1958). Nervina agreed that the relationship between Liebert and himself was terminated, and that his claim was satisfied. He cannot now bring this action against Liebert in an attempt at an additional recovery when any obligation Liebert may have had to him was extinguished by the August 10 document. Id. §34.

Nervina's only argument before Judge Bonsal that the August 10, 1976 document was not an accord and satisfaction was that he was paid the exact amount he believed Liebert owed him, and therefore there could not have been an accord. The very existence of this lawsuit is proof that is not so. Nervina bases the complaint on acts which are all alleged to have occurred before August 10. If there was any breach of contract, malicious interference with contract rights or conversion of trade secrets (which appellees deny), Nervina's "claims" were existing and matured before August 10, and he suffered damages by that date - damages which he claims are at least \$600,000. Yet he settled for substantially less, and accepted payment of a smaller amount than he believed was due him. This meets the hornbook definition of an accord and satisfaction, and is dispositive of the instant case. When Nervina accepted payment under the August 10 document his claims were extinguished and he lost any right he might have had to recover from defendants.

The August 10 accord and satisfaction also bars the maintenance of this action against appellees Good and Ambrose. An accord and satisfaction between a person damaged and one of several responsible therefor will discharge the others from liability, since a party is entitled to only one satisfaction. When he receives that satisfaction, he is deemed to be fully

compensated, his claim is extinguished, and he may not seek recovery from any others who might be liable. Barrett v. Third Avenue R. R. Co., 45 N.Y. 628 (1871); Littell v. Cranford Co., 203 N.Y.S. 2d 975 (Sup. Ct. Queens Co. 1960). Therefore, even assuming Good or Ambrose might have been liable for breach of contract or tort, (which they deny) the August 10 accord and satisfaction extinguished any such liability.

IV

THIS COURT LACKS PERSONAL JURISDICTION
OVER APPELLEE GOOD

It is settled that jurisdiction over individual officers and employees of a corporation may not be predicted merely upon jurisdiction over the corporation. Path Instruments International Corp. v. Asahi Optical Co., 312 F. Supp. 805, 810 (S.D.N.Y. 1970). Appellee Good is a resident of Ohio, and was served in that State. He did not take any action in New York on his own behalf in connection with the subject matter of this action (A13). While he may have visited New York City for business purposes connected with the events alleged in the complaint, the complaint does not even allege that he engaged in a course of conduct on his own as opposed to Liebert's behalf. The complaint against him, therefore, should be dismissed for lack of personal jurisdiction. Path Instruments International Corp., supra.

It is irrelevant that Good was a New York resident at the time some of the acts alleged in the complaint are alleged to have taken place. He was not a New York resident at the time he was served with the summons and complaint, and this Court may exercise jurisdiction over him only if, while he was a resident of New York, he committed an act which would subject him to long-arm jurisdiction under CPLR 302. See State v. Davies, 24 App. Div. 2d 240, 265 N.Y.S. 2d 358 (3rd Dep't 1965), aff'd, 18 N.Y. 2d 950, 277 N.Y.S. 2d 146 (1966); McLaughlin, Practice Commentaries to CPLR 302, 7B McKinney CPLR 302 at 70. Good did not commit any of the prescribed acts, and this Court lacks jurisdiction over his person.

Nervina's theory below seemed to have been that, since Good would benefit if Liebert was successful, Good's acts in New York were for his own account as well as Liebert's. If this theory were correct, a corporate employee would always be subject to personal jurisdiction if he came to New York on his corporation's business. Path Instruments International Corp., supra, held this is not the case. Generally speaking, a corporate employee will derive some benefit if his corporation is successful. This especially may be true if the corporation is successful as a direct result of the employee's efforts, since he then may receive a raise in pay or a promotion. This does not, however, mean that the employee is deemed in law to be

acting on his own as opposed to his company's behalf. The holding of Path Instruments is that when an employee is in New York on his employer's business he is not considered to be here in his personal capacity, and his acts do not subject him to personal jurisdiction in this State. Nervina does not deny Good was here on Liebert's behalf; indeed, his brief below (A44) stated that Good contacted plaintiff "on behalf of Liebert." The burden of proving jurisdiction is on the party asserting it. Chunky Corp. v. Blumenthal Bros. Chocolate Co., 299 F. Supp. 110, 114 (S.D.N.Y. 1969). Nervina has failed to meet this burden. Good's acts in New York "on behalf of Liebert" do not subject him to personal jurisdiction here, and the complaint against him should be dismissed.

V

THE FIRST COUNT SHOULD BE DISMISSED AGAINST
APPELLEE GOOD BECAUSE IT DOES NOT ALLEGE
THAT HE AND NERVINA ENTERED INTO A CONTRACT

The complaint's first count alleges a breach of a contract to establish Nervina as Liebert's exclusive independent sales representative. The complaint, on its face, alleges only that the purported contract was entered into by Nervina and Liebert. It does not even contend that Good was a party to it. That count, therefore, fails to state a claim against Good, and should be dismissed as to him.

The first count alleges Good approached Nervina "on behalf of Liebert Corporation," and proposed that Nervina enter into an agreement with Liebert. It then alleges that Nervina eventually accepted the offer, and that the contract was breached. Clearly, this count fails to state a breach of contract claim against Good. Good is an employee of Liebert. He negotiated and dealt with Nervina, not on his own behalf, but on behalf of Liebert. The first count does not even allege a contract between Good and Nervina. It obviously cannot state a claim against Good for breach of a contract to which he was not a party. It should be dismissed.

Conclusion

For the foregoing reasons, appellees respectfully request that the order and judgment of the court below dismissing the complaint be affirmed in all respects.

New York, New York
May 5, 1977

Respectfully submitted,

SEWARD & KISSEL
Attorneys for Appellees

Anthony R. Mansfield
Jon Paul Robbins
Of Counsel

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

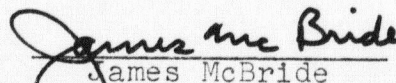
JAMES McBRIDE, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside at 92-05 Ridge Blvd., Brooklyn, New York 11209.

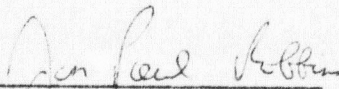
2. On May 5, 1977, I served the annexed Brief by delivering two true copies thereof to the office of:

Bernstein & Mahoney
170 Broadway, Suite 201
New York, New York 10038

attorneys in the action at the address designated by said attorneys for that purpose.


James McBride

Sworn to before me
May 5, 1977


Notary Public

JON PAUL ROBBINS
Notary Public, State of New York
No. 31-4520299
Qualified in New York County
Commission Expires March 30, 1978